

ARTICLE

An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts

Guido Calabresi*

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INTRODUCTION

Throughout this century in the United States, four approaches to law have vied for dominance among legal scholars. While there have been many more than four “schools” of law or “movements,” many of these, I think, have represented a variant, a particular form or specific application, of one of these four underlying points of view. In other instances, the particular school or movement has merged elements of more than one of my approaches. (And, in such cases, the school was usually criticized for its vagueness and lack of

* Judge, United States Court of Appeals for the Second Circuit; Sterling Professor Emeritus and Professorial Lecturer, Yale Law School. This Article derives from a number of lectures and workshops I have given over quite a few years. An early version was the core of the Brandeis lecture I delivered at the Israel Academy of Sciences and Humanities on November 1, 1995. The current rendition was given as a lecture at Stanford Law School on May 2, 2003. I am particularly grateful to Roberto Gonzalez, Michael Halberstam, Edward Loya, and the editors of the *Stanford Law Review*, who greatly and elegantly helped convert the ramblings of a judge into a scholarly article.

coherence, but more on that later.) Each of these approaches is very much alive and influential today—and each is so in a relatively recent form or manifestation.

In this Article, I would like to describe briefly the four points of view, indicate how the current manifestations of each relate to earlier versions, and finally suggest how each would analyze an issue that is, and will become ever more, pressing in the law, namely, whether we own our bodies and their parts or whether, instead, they belong, at least in some instances, to those who need them.

I. DOCTRINALISM OR AUTONOMISM

The first approach which was dominant at the beginning of the century, and probably remains so in Europe today, may be termed formalism, doctrinalism, or autonomism.¹ While it has taken more than its share of lumps throughout this century in America,² it is currently enjoying something of a renaissance. This is especially so among a widely varied group of contemporary legal scholars who would, if pressed, probably describe themselves as members of quite different schools or movements, but all of whom, in fact, share this way of doing legal scholarship.³

1. The American version of doctrinalism is usually traced to Langdell's legal science. See C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* (photo. reprint 1980) (2d ed. 1880). For a discussion of the nuances of Langdell's system, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). American legal science was strongly influenced by the German *Pandectists*, whose work consisted in the conceptual systematization of principles they discovered in their study of the Roman civil law *Digest* (the *Pandectae*) and eventually culminated in the promulgation of the German Civil Code of 1896 (the BGB). JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 57-67 (2d ed. 1985). Still in effect today, the BGB is admired by the trained expert for its precision and rigor of thought. The German Civil Code and German legal science exerted a significant influence on the codes of Austria, Brazil, Czechoslovakia, Greece, Hungary, Italy, Switzerland, Yugoslavia, and Japan. Italian legal literature like that in many other civil law countries still echoes German pandectist methods. See KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW*, 105, 144-56 (Tony Weir trans., 3d rev. ed. 1998).

2. See *infra* Part II.

3. Formalism is flourishing in many legal fields, such as contracts, see David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002), constitutional and statutory interpretation, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, at xx (Amy Gutmann ed., 1998) ("Long live formalism. It is what makes a government of laws and not of men."); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 544 (1994); John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREENBAG 283 (2002), jurisprudence, see LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001); Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, 142 U. PA. L. REV. 549 (1993); Frederick Schauer,

Its fundamental characteristic is that it views law as autonomous and distinct from other fields of learning.⁴ Legal analysis, under this approach, at least in its pure form, can be carried out without reference to other disciplines or other sources of values. The principal job of such analysis is to render the rules of law consistent and coherent with each other, so that like cases are treated alike.⁵ And, of course, what is “a like case,” itself derives from values already inherent in the system (however they got there), rather than from some exogenous source.⁶ In its traditional European form, it abjures studies, “*de jure condendum*,” and attempts solely to rationalize and render coherent the rules that derive from the great Codes of Law (themselves, as it happens, mainly nineteenth century artifacts).⁷ In the United States today, the system—the legal landscape—it seeks to make consistent or rational is more complex. For it is made up of a large mishmash of common law precedents as well as statutory and constitutional norms, both at the state and federal level.⁸ This complexity of legal sources, while it makes the job of modern American doctrinalists harder and quite interesting, does not really make it different, in approach, from that of their earlier predecessors, or their European counterparts.

Some have described this approach as inherently conservative.⁹ And so in a sense it is, for it does not contemplate the introduction of new or modified

Formalism, 97 YALE L.J. 509 (1988), and international law, see Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INTL. L. 517 (2001).

4. Formalists thus frequently speak of law as a science, with its own principles, processes of reasoning, and discoverable facts. See Grey, *supra* note 1, at 9-19, 29-31 (describing Langdell's peculiar conception of the scientificity of classical legal science). Depending on the conception of science, such autonomism can take on very different forms. Hans Kelsen's “normative science” of law stands, perhaps, as the most pointed formulation of a “pure” theory of law . . . [that] is concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject-matter law[,] . . . endeavour[ing] to free the science of law from all foreign elements.” Hans Kelsen, *The Pure Theory of Law*, 50 L.Q.R. 477, 477 (1934).

5. See ENREST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 12-13 (1995) (“[P]rivate law strives to avoid contradiction, to smooth out inconsistencies, and to realize a self-adjusting harmony of principles, rules, and standards. . . . Internal to the process of the law in the incremental transformation or reinterpretation or even the repudiation of specific decisions so as to make them conform to a wider pattern of coherence. In the classic phrase of common law lawyers, the law can work itself pure.”); Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978) (arguing for the relative completeness of mature legal systems and against indeterminacy of results even in hard cases).

6. NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 186 (1978) (“[N]o clear line of distinction can be drawn between argument from legal principle and argument from analogy. Analogies only make sense if there are reasons of principle underlying them.”).

7. See ZWIGERT & KÖTZ, *supra* note 1, at 74-179 (describing the great Codes of the Romanistic (French) and Germanic legal traditions).

8. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1-7 (1982).

9. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606 (1908) (“The effect of all system is apt to be petrification of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle

values into the scheme as part of the role of legal scholarship. As a result, that scholarship, while nominally only engaged in the elucidation of preexisting values and not in their justification, nevertheless readily comes to be taken as a defender of the values it finds embedded in the system. Some forms of it are, however, much more conservative than others. If the approach negates the right of anyone—legislatures as well as courts—to change the codes (as it sometimes did in Europe), or to alter the fundamental legal relationships established by that odd mixture of common law, statutory, and constitutional rules that constitutes our legal landscape (as it occasionally seemed to do even in the United States), it becomes very, very conservative indeed. If, instead, it only asserts that the introduction of new values (or the criticism of the system on the basis of exogenous values) is not the role of scholars (or, perhaps, of courts), it merely removes one or more *actors* from the play of reform and renewal. It does not, in itself, deny that “others”—sometimes named and sometimes unnamed—do have that job to do.¹⁰ As such, its conservatism is far more limited.

In any event, conservatism, in this sense, does not mean “right wing” (in modern political parlance). That is, the values that the system may embody (which formalism does not question) may be “left” values, “right” values, what sometimes are called “traditional liberal” values, or any other set that somehow came to be rooted in the legal landscape, or codes. It is conservative as against reformist or radical in its view of the role of legal scholarship, but what it conserves is quite another matter.¹¹

This can be seen most dramatically by looking at Italy in the fascist era. Those scholars who were themselves politically antifascist were to a person “formalists” of the most extreme sort. The “ancient” codes were not to be tampered with, by anyone, and the fact that those codes were on the whole an embodiment of nineteenth-century thought (political as well as economic) may or may not have been a coincidence.¹² The “legal sociologists,” as their opponents were somewhat scornfully termed at the time in Italy, were instead usually fascist sympathizers (or at least not opponents of the regime) to whom

independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another.”)

10. H.L.A. Hart, Joseph Raz, Robert Summers, Neil MacCormick, Jules Coleman, and other members of the (not so) “New Analytical Jurisprudence” take this view. See Neil MacCormick, *Contemporary Legal Philosophy: The Rediscovery of Practical Reason*, 10 J.L. & Soc’y 1 (1983); Robert S. Summers, *The New Analytical Jurists*, 41 N.Y.U. L. REV. 861 (1966).

11. Indeed, in some of its versions, it could become quite revolutionary. If no one, neither legislatures, nor courts, nor scholars, can alter the law; if their job is merely to elucidate it and make it more consistent, it is not impossible that the law will become fully coherent and intolerably absurd, in which case change, when it comes, may occur through rebellion.

12. See Guido Calabresi, *Two Functions of Formalism*, 67 U. CHI. L. REV. 479, 482 (2000).

the introduction of new, frequently syndicalist, values into Italian law was far from anathema.¹³ How these different scholars reacted after the end of fascism is an interesting story.¹⁴ But for the purposes of this Article it is enough to note that in the 1920s and 1930s, those we probably would call “liberal” were doctrinalists, and hence conservative of a nineteenth-century mainly libertarian legal structure, while those we would call “right wingers” were the functionalist reformers.

Today’s autonomists usually make a bow to exogenous values, and this distinguishes them from some of their ancestors.¹⁵ This bow can take various forms:

- New or exogenous values, of course, must enter the system, but it is not the job of legal scholars (some will add “or courts”) to further them. It is up to “the legislatures” or “the people” (or some equivalent construct).¹⁶
- In some areas of the law, certainty is all important, hence it is inappropriate to do more than render the field more coherent and predictable.¹⁷
- Exogenous values do and should enter and alter the system, and not only through legislative actions, but they do so in mysterious (almost mystical) ways. It is best to let that happen as it will, and for scholars

13. The most famous of these was Giorgio Del Vecchio, Dean of the Law School at Rome, and later President of Rome University. Del Vecchio was a close friend of the dean of American “sociological jurisprudence” and of the Harvard Law School, Roscoe Pound. Both shared an antiformalist approach to law that sought to make the law respond to the social goals of the present. *Id.* at 482.

14. I tell it in more detail in *id.* at 483.

15. Consider, for example, the value pluralism and the rejection of the strict autonomy thesis exhibited by contemporary analytic jurisprudence. See William Lucy, *Adjudication, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 206, 233-40 (Jules Coleman & Scott Shapiro eds., 2002).

16. Cf. MACCORMICK, *supra* note 6, at 63 (“[I]t is good that law-making be entrusted to the elected representatives of the people, not usurped by non-elected and non-removable judges . . .”).

17. Cf. Schauer, *supra* note 3, at 539-42 (describing formalism’s virtues of predictability, certainty, and stability, and observing that to operate in this “inherently conservative mode” is “to give up some of the possibility of improvement in exchange for guarding against some of the possibility of disaster”); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 43 (1992) (arguing that legal scholars should devote themselves primarily to “practical” scholarship, of which the treatise is the paradigm case; treatises “create an interpretive framework; categorize the mass of legal authorities in terms of this framework; interpret closely the various authoritative texts within each category; and thereby demonstrate for judges or practitioners what ‘the law’ is”); *id.* at 44 (stating that legal scholars should only engage in theory and offer prescriptions in regard to “hard cases” and that these prescriptions should themselves be doctrinally constrained; by contrast, theorizing and offering prescriptions about “easy cases” (i.e. those the outcomes of which are doctrinally determinate) is the lamentable hallmark of “impractical” scholarship).

to analyze the implications of what is there, rather than to seek to criticize it.¹⁸

- Any attempt by scholars to further reform is elitist and inevitably buttresses, in its melioratism, the existing order. Our job is to make the current order lucid, consistent, and crystal-clear, and let the (inevitable) revolution (when it comes) create the new order.¹⁹

All these are modern “prefatory” justifications for different kinds of current neodoctrinalist scholarship. Whether they, in fact, reflect controvertible (that is, value- or empirically based and hence challengeable) grounds for the approach, or whether they are only rationalizations (a kind of homage to dominant nonautonomist views of law) for an underlying belief system, for a deep view of *what law is* (like that of earlier doctrinalists), is hard to say. It is, in any case, largely irrelevant, since either can equally be defended.

II. “LAW AND . . .”

The second approach arose largely in opposition to the first.²⁰ It sought a greater role for scholars, and frequently for courts as well,²¹ in the criticism and

18. Cf. S.F.C. MILSOM, *STUDIES IN THE HISTORY OF THE COMMON LAW* 150 (1985) (“[J]udges do not, as does Parliament, make avowed changes in the law in response to argument about social needs. They do not make avowed changes at all; and that is the point. Legal change under these conditions has the appearance of a conjuring trick: out of the old hat there comes a new rabbit.”).

19. Cf. Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 WM. & MARY L. REV. 263 (2002) (using Lacanian theory to condemn policy-oriented legal scholarship as partaking in the oppressive discourse of the “university,” and championing doctrinalism as rooted in the discourse of the “hysteric” insofar as it looks at law from the perspective of the governed—those subjected to the law’s power—and not from the perspective of the powerful administrator that seeks to manipulate the governed); *id.* at 371 (arguing that, unlike policy-oriented scholarship, doctrinalism produces “knowledge,” in the sense of “a greater understanding of the relationship between law and the subject,” which might eventually lead to change in the law: “If the doctrinal . . . scholarship leads to a conclusion that the law’s effect on the subjects subjected to the law is unjust or even unintended, this suggests the law should be changed. Knowledge, however, can be a dangerous thing. Sometimes one learns painful truths that one does not want to face. The client can lose the case, and sometimes this is the ‘right’ result from a legal perspective.”).

20. See generally MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) (describing the progressive and legal realist attacks on classical legal theory during the first half of the century). While progressive jurisprudence and legal realism are frequently credited with the “revolt against formalism,” see MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1947), subsequent schools have considered the task far from complete. At least two prominent academic movements of the past 30 years, Critical Legal Studies and the “New Economic Analysis of Law,” see Guido Calabresi, *The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence?*, 68 PROC. BRITISH ACAD. 85 (1982), have laid claim to legal realism’s antiformalist legacy. See, e.g., Edmund W. Kitch, *The Intellectual Foundations of “Law and Economics,”* 33 J. LEGAL EDUC. 184, 184 (identifying law and economics as a continuation of the legal realist agenda); Mark V. Tushnet, *Perspectives on*

reform of law. It often called its view of law as “functionalist,”²² although that said little about the functions it thought law ought to perform. Its underlying aim was, and is, to break out of a self-contained system of legal values which are either unchanging or change only mystically, revolutionarily, or at the hands of legislators unguided by legal scholars’ critiques and suggestions. Legal scholarship was to be at the core of lawmaking and law reform!²³ But if it was, why should anyone pay any more attention to the views of such scholars than to those of any other citizen?²⁴ What special insight did legal scholars have into values that could make them in any way privileged to criticize laws, to recommend reforms, and to indicate the functions that the legal system should serve?

The answer, for the twentieth-century functionalists, lay (as it had for Bentham long before) in other scholarly disciplines.²⁵ Legal scholars should

Critical Legal Studies: Introduction, 52 GEO. WASH. L. REV. 239, 239 (1984) (“The attack on formalism makes critical legal studies the heir to legal realism, which itself was an attack on one or two versions of formalism.”). On the variety of antiformalisms in American legal thought, see generally Martin Stone, *Formalism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND THE PHILOSOPHY OF LAW, *supra* note 15, at 166.

21. Pound’s “sociological jurists” were “to enable and to compel law-making, and also interpretation and application of legal rules, to take more account and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied.” Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. III), 25 HARV. L. REV. 489, 512-13 (1912). Even for someone as critical of nineteenth-century judicial lawmaking as Pound, the creative role of the judiciary in promoting social ends was still in the forefront. See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909) [hereinafter Pound, *Liberty of Contract*].

22. ROSCOE POUND, PHILOSOPHY OF LAW 42-43 (rev. ed. 1954) (“Attention was turned from the nature of law to its purpose, and a functional attitude, a tendency to measure legal rules and doctrines and institutions by the extent to which they furthered or achieved the ends for which law exists, began to replace the older method of judging law by criteria drawn from itself.”); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (naming Holmes, Gray, Pound, Brooks Adams, M.R. Cohen, T.R. Powell, Cook, Oliphant, Moore, Radin, Llewellyn, Yntema, Frank, and others as leaders of a rather abstractly defined “functional approach”).

23. Jerome Frank described the “common bond” between the functionalists as a “skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interests of justice, some courthouse ways.” JEROME FRANK, LAW AND THE MODERN MIND, at vii (1949).

24. I previously asked this question in reference to an unscholarly tendency in law-and-economics work in which a set of distributive norms, which turned out to reflect nothing more than the author’s personal values (in the particular context, my own), was tacitly relied upon with little attention to their structure or justification. See Calabresi, *supra* note 20, at 98.

25. The famous “Brandeis brief” submitted in *Muller v. Oregon*, 208 U.S. 412 (1908), containing two pages of legal argument and 95 pages of sociological and economic data about the conditions of working women’s lives in factories, exemplified the new interdisciplinarity. At Yale, where his work was deeply appreciated by Arthur Corbin and Walter Wheeler Cook, Wesley Hohfeld saw his highly abstract “analytical” or “fundamental” jurisprudence as the handmaiden to the new functionalism that sought “a more comprehensive, coordinated and synthetic consideration of the underlying

look, as appropriate, to economics, philosophy, history, psychology, sociology, literature, or virtually any other field or combinations of fields of study for guidance in developing a scholarly critique of the current legal landscape or of particular parts of it. Law was not to be viewed as independent or autonomous, but rather as dependent on these other fields.²⁶ Its strength lay in the fact that it could gather together the wisdom (and values) of as many of these fields as were relevant to the issue at hand into one complex and, by tradition, rigorous system.²⁷ Because of this, the legal scholar did not need to feel bound by the self-imposed limits of the underlying disciplines, however useful they might be for the practitioners of that discipline. He or she must, instead, follow the insights of these disciplines beyond the points where the economist, sociologist, etc., would go, meld them with those of other disciplines, and come up with highly imperfect—but perhaps the best available—guidelines for reforming (or confirming) the legal system in its attempt to serve the current needs of the people. Only in this way could law avoid the tyrannies of mystical conservatism, of revolutionary ardor, and of simplistic majoritarianism. Only in this way could legal scholars play a significant role in the reform or the strengthening of those rules that they were also called upon to elucidate.

I need not go into the many criticisms that have, not improperly, been directed at this approach. They have ranged from attacks on the naive reliance on specific related disciplines (e.g., sociology or economics) because of the blind spots those disciplines manifested,²⁸ through a much more general attack on the capacity of even the most complex mixture of such disciplines to indicate any values that could “scientifically” be used as a basis for criticizing

psychological, ethical, political, social and economic causes and purposes of the various branches and specific rules of the law[.]” Wesley Newcomb Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*, 1914 ASSOC. AM. L. SCH. PROC. 76, 102. And as Dean Pound put it (recapitulating the success of the new functionalism more than 50 years after his first essays appeared), “[t]he science of law of today . . . has given over its exclusiveness and seeks what may be called team play with the other social sciences.” 1 ROSCOE POUND, *JURISPRUDENCE* 349 (1959).

26. In the late 1920s, law professors at Columbia, Yale, and Johns Hopkins, such as John Clark, Walter Wheeler Cook, William Douglas, Leon Marshall, Underhill Moore, Herman Oliphant, and Hessel Yntema were all intensely interested in the social sciences. At Yale, social scientists such as the economists Leon Marshall and Walton Hamilton joined the law faculty, the anthropologist Bronislaw Malinowski taught a course in legal anthropology, and Dean Robert Hutchins raised funds for interdisciplinary research in psychology, medicine, and law for the Institute of Human Relations. *AMERICAN LEGAL REALISM* 234 (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993). See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

27. See, e.g., Walter W. Cook, *Scientific Method and the Law*, 13 AM. B. ASSOC. J. 305 (1927).

28. See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 114-50 (1987) (critiquing law-and-economics scholarship for its failure to confront key conceptual problems in normative welfare economics).

laws.²⁹ As Arthur Corbin, the greatest of the Legal Realists suggested in his stunningly skeptical retirement talk to the Yale Law School faculty, those who hope to find answers in the social sciences are bound to fail, as did the formalists who sought them in the fabric of the law itself.³⁰ Yet, having said this, Corbin indicated that the uncertain quest for guidance, from the social sciences, from other “underlying disciplines” and even from the, then much-maligned, structure of law itself, was not to be sneered at and could help us improve the law, so long as we were willing to forego any hope of clear, “scientific,” or indisputable results.³¹ It might help us guide courts and legislators to make better guesses. And this is no small thing if, as I firmly believe, the province of good government—courts and legislatures—informed in part by scholars, is to make good *guesses*.

In the early days of this century, this approach focused on sociology.³² Later, in a sort of renaissance during the New Deal, it relied on rudimentary economics as well as on sociology,³³ and somewhat later yet, on psychology and psychoanalysis.³⁴ In its amazingly successful 1960s “rediscovery,” which

29. Robert Maynard Hutchins, who was swept up in the legal realist movement and became Dean of Yale Law School, became one of the leading critics of the alleged “relativism” implicit in the social science approaches to law after he took up the presidency of the University of Chicago in 1929. ROBERT MAYNARD HUTCHINS, *THE HIGHER LEARNING IN AMERICA* (1936). See EDWARD A. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 139-58 (1973), for a detailed account of the debate between the legal realists and their “Chicago School” critics, such as Mortimer Adler and Hutcheson, against the background of the Depression and the totalitarian threat during the 1930s. Later, the legal process thinkers would question the ability of empirical social science approaches to law to provide a constraint on the indeterminacies that the legal realists had uncovered. See Neil Duxbury, *Post-Realism and Legal Process*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 291, 300 (Dennis Patterson ed., 1996).

30. Arthur Corbin, Retirement Talk Delivered to the Faculty of the Yale Law School, 1942, at 2 (on file with author).

31. *Id.*

32. See, e.g., Pound, *Liberty of Contract*, *supra* note 21; Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

33. The legal realists considerably broadened the attack on formalism in the late 1920s and 1930s by arguing for the indispensability of statutory and administrative reforms in a rapidly changing social and economic environment. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). They further undermined formalism’s autonomism by their much more concerted attempts at reshaping legal decisionmaking in accordance with the emerging empirical sciences (consider the work of Underhill Moore), economics and organizational theory (Adolf Berle and Gardner Means), psychology (Joseph Hutcheson), psychoanalysis (Jerome Frank), and keener attention to actual institutional and social practices (Karl Llewellyn). See HORWITZ, *supra* note 20, at 193-247.

34. See, e.g., JAY KATZ, JOSEPH GOLDSTEIN & ALAN M. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY, AND LAW* (1967); Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053 (1968); Joseph Goldstein & Jay Katz, *Abolish the “Insanity Defense”—Why Not?*, 72 YALE L.J. 853 (1963). At the same time, the sociological approach continued to flourish. See, e.g., LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (1969).

for a while threatened, foolishly, to dominate all of U.S. law, it concentrated on quite sophisticated economic insights.³⁵ Today, while the New (1960s) Economic Analysis of Law (if somewhat less vainglorious than at earlier times) remains alive and well, so do Law and Philosophy, Law and Psychoanalysis, Law and History, Law and Literature, and any number of other permutations and combinations of the "Law and . . ." theme.³⁶ For all the criticisms leveled at it, this approach continues to be as significant a source of legal scholarship as there is in America today. It probably remains the principal way in which U.S. legal scholars, who wish to make normative statements—critical or confirmatory—about legal rules, still undertake their task.

III. THE LEGAL PROCESS SCHOOL

The third approach arose, and developed to its highest point, partly in reaction to the overly simple use of social science that characterized the "Law and . . ." scholars of the 1930s, especially those "Law and . . ." scholars who also called themselves Legal Realists.³⁷ It had its greatest flowering at the Harvard Law School in the 1950s,³⁸ although perhaps its most powerful and

35. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1973); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972); see also LAW, ECONOMICS, AND PHILOSOPHY (Mark Kuperberg & Charles Beitz eds., 1983) (collecting early law-and-economics articles). In the early 1980s, I observed that law and economics "has been taken up with enthusiasm by young scholars in any number of law and economic faculties, and has been described (rather ruefully) by many an older academic as the only sure guide to promotion and tenure." Calabresi, *supra* note 20, at 85. For a measure of the expanse of law-and-economics scholarship, consult the BIBLIOGRAPHY OF LAW AND ECONOMICS (Boudewin Bouckaert & Gerrit De Geest eds., 1992) (spanning 600 pages and covering publications in 13 countries).

36. Thus, among current legal journals, in addition to many law-and-economics journals, we find: *Behavioral Sciences and the Law*; *Cardozo Studies in Law and Literature*; *Columbia Journal of Law and Social Problems*; *Cornell Journal of Law and Public Policy*; *Criminal Justice and Behavior*; *Criminal Justice Ethics*; *Ethics: An International Journal of Social, Political & Legal Philosophy*; *Georgetown Journal of Legal Ethics*; *Harvard Journal of Law and Public Policy*; *Harvard Journal of Law and Technology*; *International Journal of Offender Therapy and Comparative Criminology*; *Issues in Law and Medicine*; *Journal of Contemporary Health Law and Policy*; *Journal of Law and Education*; *Journal of Law and Politics*; *Journal of Law and Religion*; *Journal of Legal Studies*; *Jurimetrics*; *Law and History Review*; *Law and Human Behavior*; *Law and Psychology Review*; *Law, Politics and Society*; *Legal Studies Forum*; *N.Y.U. Review of Law & Social Change*; *Notre Dame Journal of Law, Ethics & Public Policy*; and the *Yale Journal of Law & the Humanities*.

37. For this history, see HORWITZ, *supra* note 20, at 247-72.

38. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (prepared from the 1958 Tentative Edition); HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed. 1950). Though it was not formally published for another three decades, Hart and Sacks's *THE*

mature works were those of Alexander Bickel, Harry Wellington, and John Ely at Yale in the 1960s.³⁹ If—as Corbin suggested—one could not find answers to legal issues in underlying principles,⁴⁰ and if one was dissatisfied with merely making a preexisting autonomous system more rigorous and internally consistent, what could a legal scholar do? The answer that the Legal Process approach advocated lay in comparative institutional analysis. Legal scholars could examine courts, legislatures, administrative agencies, executives, juries, etc., and shed light on the particular attributes of each of these that would make a given institution especially suited to decide some issues rather than others.⁴¹ In effect, this approach would help select who should be the definers and determiners of the values that would guide the legal system. It would do so, neutrally, based on institutional capacity.

No one can doubt that much of great value was and continues to be done through this approach.⁴² It was nonetheless successfully criticized on two quite different grounds and, perhaps as a result, in the late sixties yielded its

LEGAL PROCESS, *supra*, was read and taught at dozens of law schools. Alexander Bickel, for example, taught from early drafts of the materials in the late 1950s at Yale. See Letter from Alexander Bickel to Albert M. Sacks (Mar. 18, 1957) (calling the materials “extremely appetizing” and saying “just the medicine for me”), cited in William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra*, at li, ciii n.229.

39. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* (1965); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); Harry H. Wellington & Lee A. Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547 (1963). In contrast to Hart and Sacks, Bickel and Ely focused on constitutional law and particularly on the issue of the “counter-majoritarian difficulty.” They argued that courts could maintain their legitimacy by exercising the “passive virtues” to avoid unnecessarily conclusive constitutional rulings (Bickel) or by intervening only where there is some malfunction in the political process, such as the entrenchment of insiders or systematic prejudice against minority interests (Ely).

40. See Corbin, *supra* note 30.

41. For a recent example of this type of reasoning, consider Justice Breyer’s separate opinion in *Ring v. Arizona*, in which he argues that juries have an “important comparative advantage over judges” in determining whether the imposition of the death penalty in a particular case would serve retributive ends because jurors are “more attuned to the community’s moral sensibility.” 536 U.S. 584, 615 (2002) (Breyer, J., concurring in the judgment) (quotation marks and citations omitted). Importantly, Justice Breyer’s opinion implicitly accepted that the *United States Supreme Court*, not the Arizona legislature, was the proper body under the Eighth and Fourteenth Amendments to make this determination.

42. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); see also CALABRESI, *supra* note 8.

dominance to the resurging "Law and . . ." approach, in the form of the New Economic Analysis of Law.⁴³ The first and, perhaps lesser criticism, lay in the Legal Process scholar's tendency to focus too much on courts and legislatures, rather than to include *serious* analysis of executives and administrative agencies, let alone of such highly important value-asserting bodies like juries, initiatives, and referenda.⁴⁴ Moreover, in doing this, the analysis of legislative capacity was easily criticized as panglossian and, also, provincially focused on Congress and the United States Supreme Court and/or the courts and legislature of Massachusetts. Little heed was paid to the serious shortcomings of the legislatures as reflectors of majority will, and hence as value propounders for the society,⁴⁵ or to the existence of elected judges in many states.⁴⁶ And no heed was given to those jurisdictions (like the District of Columbia) whose "legislatures" could not possibly be viewed as reflecting the wishes of its citizens.⁴⁷

Serious as these practical criticisms were, they were not as important, because nowhere near as fundamental, as the second. Legal Process, some critics said, was a disingenuous and misguided attempt to return legal scholarship to its pre-Legal Realism autonomous status. Studies of comparative institutional capacities cannot be independent of the values that one seeks to further. One cannot decide whether courts or legislatures can do a job better, in the abstract. One must know what that job is, what values and goals one is trying to achieve or protect.⁴⁸ Only then can one discuss whether

43. See Calabresi, *supra* note 20.

44. *The Legal Process*, for example, includes less than 50 pages (out of more than 1300) on popular initiatives, the election of public officials, and reapportionment. See HART & SACKS, *supra* note 38, ch. 4 ("Lawmaking and the Political Process"); *id.* at 677-80 (expressing doubt about the judiciary's role in reapportionment).

45. The myopia of *The Legal Process* about the ineffectiveness of political representation is perhaps reflected in its total failure to mention *Brown v. Board of Education*, 347 U.S. 483 (1954).

46. See Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 976 (2001) ("Nearly 87% of state trial judges and nearly 82% of state appellate judges stand for election of some type."). Chief Justice Abrahamson observes that "[e]lected judges pose the majoritarian dilemma: In a government committed to constitutionalism and the protection of rights, how can judges accountable to the electorate, accountable to the majority, safeguard the minority?" *Id.* at 978.

47. In conversations with many of the leading early proponents of Legal Process, I was struck by how often Judge David Bazelon was the subject of their most intense criticism for his "activist" behavior which did not fit their strictures. That, at the time, a large part of his job was that of Chief Judge of the Circuit that was, in a practice, the Supreme Court of the District of Columbia (the Court of Appeals for the D.C. Circuit) never seemed to be noted, let alone made part of an evaluation of his work.

48. The value neutrality of the Harvard process theorists may have been based on the perceived value "consensus" of the 1950s, a perception which, if it ever existed, crumbled in the 1960s. Biographically, at least, this is odd given the fact that both Hart and Sacks were involved in civil rights struggles in the 1950s. See Eskridge & Frickey, *supra* note 38, at cvii-cxiii, cxvii (also noting that years later, in 1967, Sacks was tear-gassed at a Vietnam

people selected and sheltered—as judges are—make preferable decisionmakers to, say, people elected and exposed—as legislators are. And this criticism remains valid, however sophisticated one's analysis of legislative and judicial law making is.

Even if one responded completely and successfully to the first set of criticisms, through more sophisticated scholarship, the Legal Process approach would fail because it would still tell us nothing about the values of the system, the rights it seeks to enforce through one institution or another. Are these to be taken for granted and above critical analysis? Are they, in other words, simply to be found, autonomously, in the legal landscape, as the doctrinalists' work had implied?⁴⁹ Or are they exogenous and subject to criticism by legal scholars? And if so, what are they, and where do they come from? Without answers to these questions, the critics asserted, a serious discussion of which institution can do what best is bound to be either inconclusive or meaningless. Indeed, it can be worse, and hide its true meaning behind unstated and unanalyzed presuppositions.

Despite these criticisms, legal process approaches are exceedingly common in current legal scholarship. Some writers have even announced the existence of a "New Legal Process School" that is said to be a major force in modern law.⁵⁰ It is characterized by far greater sophistication in its view of legislative

protest in Washington, D.C.). For a discussion of legal process scholarship in this period, see Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988).

Although later process scholars such as Ely openly emphasized certain values, such as political participation, his proceduralist approach to defining illegitimate derogations of this value was attacked as inadequate by critics who claimed that it either tacitly smuggled in a substantive account of fundamental rights or required such an account to avoid fatal indeterminacy. See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1980); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Scholarship on civic republicanism arose in part as a reaction to the alleged normative thinness of these process-based constitutional theories. See, e.g., Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

49. See *supra* Part I.

50. One face of the new legal process is the resurgence of interest in statutory interpretation. See William N. Eskridge & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) (describing a new agenda for the study of legislation that builds on the legal process school and its critiques from law and economics and critical legal studies); Daniel A. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919 (1989) (reviewing Eskridge and Frickey's legislation coursebook in the context of the new legal process); see also William Eskridge & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991) (describing a new "genre" of legal thought that builds on legal process).

Another face of the new legal process is the work that goes under the heading of "the Columbia School," which embraces a spirit of Deweyan "experimentalism" by focussing on the development of *new* institutions. Michael Dorf argues that

Hart and Sacks were well aware that judgments about procedural fairness rested upon and implicated substantive value judgments, as, for example, their embrace of purposivism in statutory interpretation clearly reflects. Where they went wrong was their assumption—perhaps reasonable in its time—that America had generated all of the institutions necessary

capacities (interestingly, it often relies for this greater sophistication on studies in a related discipline, political science, like those of Robert Dahl and his distinguished followers⁵¹), by a greater emphasis on value-asserting lawmaking institutions other than courts and legislatures,⁵² and most importantly, by an open recognition of the need to consider separately the issue of rights and value formation.⁵³

to resolve the conflicts likely to emerge, or at worst, that the needed institutions could be found among the menu of arrangements throughout the world.

Michael C. Dorf, *An Institutional Approach to Legal Indeterminacy*, 78 N.Y.U. L. REV., draft at 69-70 (forthcoming June 2003); see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (advocating decentralized problem solving as more democratically participatory and effective than centralized approaches); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Experimental Government*, 53 VAND. L. REV. 831 (2000); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (proposing a "structural regulatory" approach to addressing subtle forms of workplace inequality).

Since I last surveyed the field, see Guido Calabresi, *Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 81 (1991) (arguing for more limited use of the supremacist approach to judicial review and advocating the adoption of nuanced Elyean and Bickellian views and techniques), there has been a notable increase in the Courts' reliance on clear-statement rules and other devices for invalidating a law without conclusively deciding a substantive constitutional question. At the same time, the Court has declined to adopt other techniques of this kind. See, e.g., *Quill v. Vacco*, 80 F.3d 716, 731-43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 521 U.S. 793 (1997). All this has spurred a new dialogue on legal process themes. See, e.g., Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281 (2002) (exhaustively categorizing these devices); Cass R. Sunstein, *Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (describing the democracy-forcing virtues of "decisional minimalism"); Mark Tushnet, *Subconstitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871 (2001) (worrying that these purportedly deferential devices tend to be conclusive in fact).

51. Dahl's earlier work can be described as supporting the optimistic pluralism of the process theorists, see ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); his later writings, instead, as embracing a more pessimistic account of political participation in America, see ROBERT DAHL, *DEMOCRACY IN THE UNITED STATES* (3d ed. 1976). For a discussion of this development in the political science literature and its implications for process theory, see Richard Davies Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223, 243-44, 252 (1981).

52. See *supra* note 50.

53. For example, Eskridge and Peller say that the New Public Law scholarship (which is functionally the same as the "new legal process") rejects the purported neutrality of the old process school and instead embraces "normativism," which is "antipluralist, antiformalist, and strongly value-oriented." Eskridge & Peller, *supra* note 50, at 745-46. The values they mention are an amalgam of views associated with republicanism, antiracism, feminism, and strains of postmodernism. *Id.* at 759-61. At the same time, however, they want to hold on to the "central idea that justice resides in process" and assert that "[p]rocedure is thus separate from politics." *Id.* at 762. They recognize this tension "between an attraction to proceduralism and . . . a conviction that all decisionmaking is ultimately normative," *id.* at 762-63, but it's far from clear that attempting to achieve an "ideological centrism" between right and left will allow them to escape this dilemma. Similarly, Sunstein must put

No longer unselfconsciously autonomous, the New Legal Process examines comparative institutional capacities, *given* the desire to further certain values or protect certain rights. It openly recognizes, however, the tentative nature of its analysis, and admits that all its conclusions must ultimately depend on a defense of the validity of the values and rights asserted. This in turn seems to require either a turning inward (and mirroring the doctrinalists) or outward, and seeking exogenously in other disciplines a defense of the values and rights asserted (as would the protagonists of “Law and . . .” approaches).

IV. LAW AND STATUS

I call the fourth approach that has played a major role in the U.S. legal scholarship, “Law and Status.” Its thesis is that legal scholars should examine how laws and the legal system affect specific categories of people. It asks that all law be questioned and criticized on the basis of its treatment of certain preselected groups. While in theory this could be done with respect to any category, e.g., the elect or the nobility, in practice, in America in this century, the focus has been on groups that have been viewed as exploited, disadvantaged, or otherwise dominated. How laws—even laws that do not expressly focus on these groups—affect them, how they came to be, and what they do to these “little ones” is, this approach contends, the proper object of legal scholarship.

This approach usually begins by taking for granted an underlying value system. Whether it be a religious one that insists on a favored treatment for the elect or an egalitarian one that demands equal wellbeing or power for the exploited, its analysis brings to light and emphasizes deviations in the law from that value system.⁵⁴ In doing this, the approach often makes use of each of the previous approaches to law that I have discussed. It may point out, for example, how torts, taxation, or property *doctrines* affect women differently from men. It may next use sophisticated *economic analysis* to demonstrate these differences and their value consequences. It may then describe how power was used (and by *what institutions*) to bring that result about. And, finally, it may or may not leave open the question of whether the result is good or appalling either on the basis of the more general legal topography or in terms of values derived from a particular “Law and . . .” analysis.

affirmative value on judicial minimalism for his proceduralist approach to work. While he acknowledges that “the case for minimalism is not separable from an evaluation of underlying substantive controversies,” he says that “democratic self-government is one of the rights to which people are entitled, and unless the democratic process is not functioning well, judicial foreclosure may represent not a vindication of rights but a controversial choice of one right over another.” Sunstein, *supra* note 50, at 30-33. But, of course, choosing minimalism over judicial vindication of a right is itself a choice of one right over another.

54. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1991) provides a good exposition of the value system relied upon by much of today’s law-and-status scholarship.

In this century it has had many manifestations. I believe that much of the discussion of Law and Organized Labor during the New Deal was of this sort.⁵⁵ Certainly, the studies of Race and the Law, which to some extent foreshadowed *Brown v. Board of Education*,⁵⁶ and which have flourished ever since, are examples of it.⁵⁷ (Not surprisingly, Race and the Law itself early divided into quite a few subsidiary variants.⁵⁸) The brief flowering of Poverty Law in the late 1960s and early 1970s (was it a rebirth of the manifestation of this approach that had been strong during the New Deal, or—as I tend to think—was its focus sufficiently different to be properly viewed as a new subspecies?) is another.⁵⁹ More recently, the important work on Sexual Orientation and the Law,⁶⁰ and, probably most significantly of all, the rise of Gender and the Law, or more precisely, of Feminist Jurisprudence, reflect variations on this theme that seem likely to affect legal scholarship for a very long time to come.⁶¹

55. For a discussion of this history, see CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985).

56. 347 U.S. 483 (1954).

57. Important early works in this line of scholarship are Eugene V. Rostow, *The Japanese American Cases—a Disaster*, 54 YALE L.J. 489 (1945), and Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). More recent events in the development of this field include Derick Bell's course and casebook, DERICK BELL, *RACE, RACISM, AND AMERICAN LAW* (1973), and the student protests at Harvard Law School that led to the creation of an "Alternative Course" on race and law in 1981. These events, combined with the influence of Critical Legal Studies, led to the birth of the Critical Race Theory movement in the late 1980s. See CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter CRITICAL RACE THEORY: THE KEY WRITINGS]; see also PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

58. For example, compare the treatment of race and discrimination in RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997), with the works of Critical Race Theory described *supra* note 57.

59. The theoretical underpinnings of this approach include Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969), and Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

60. See, e.g., *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (William B. Rubenstein ed., 2d ed. 1997); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999); JANET E. HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 949 (1989); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998).

61. See, e.g., *CRITICAL RACE FEMINISM: A READER* (Adrien Katherine Wing ed., 1996); SUSAN ESTRICH, *REAL RAPE* (1987); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF STATE* chs. 8-13 (1989).

To take a couple of examples, one might trace the feminist scholarship on sexual harassment from MacKinnon's canonical book, CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979), through

The criticisms of this way of looking at law—some of which question whether it even is a theory of law, a type of criticism for that matter leveled from time to time at each of the other approaches as well⁶²—are sufficiently current that I need not outline them. For my purposes in this piece, it is enough to note that if one takes all the variants of Law and Status currently extant, a very large part of today's legal scholarship is of this sort.⁶³ And this is true whether one focuses only on the relatively simplistic examples of it or one considers also the more complex manifestations, like studies which center, for example, on the law and economics of racial discrimination in the workplace.⁶⁴

V. SCHOOLS AND MOVEMENTS⁶⁵

Some schools and movements in American scholarship of this century are clearly identified with one or another of these approaches. The New Economic Analysis of Law—whether in its Chicago or Yale manifestations—is an obvious example of a movement which is firmly centered in the “Law and . . .”

scholars such as Franke and Schultz, who have questioned the contours and rationales of sexual harassment law, see Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998), to Janet Halley's nearly “heretical” critique of strong versions of sexual harassment doctrine from the standpoint of queer theory, see Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet Halley eds., 2002).

62. Such criticisms are more frequently heard at faculty meetings and colloquia than in scholarly writings. Thus the great German scholar, Konrad Zweigert, see *supra* note 1, greeted my presentation of the New Economic Analysis of Law, at a seminar at the Max Planck Institute in Hamburg in 1965, with the categorical statement: “That is all very interesting, but you must realize that it isn't law or legal scholarship.” My rather rude answer, “Perhaps not now, but it soon will be,” was all too prescient. An earlier example is said to be Yale's failure to appoint Myres McDougal to its faculty until he demonstrated at another school that he was not an “arid formalist,” as formalism by that time no longer counted as valid law work at Yale. I myself heard that very great scholar, by then a Sterling Professor at Yale, level the same charge at some Oxford Analytical Philosophers of Law.

63. Consider the significant number of journals focussed on law and status, including: *American Indian Law Review*; *Asian Law Journal*; *Chicano-Latino Law Review*; *Harvard Civil Rights-Civil Liberties Law Review*; *Harvard Latino Law Review*; *Harvard Women's Law Journal*; *Hastings Women's Law Journal*; *Law and Inequality*; *Law and Sexuality: A Review of Lesbian and Gay Legal Issues*; *National Black Law Journal*; *Yale Journal of Law and Feminism*.

64. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971). On discrimination in the market more generally, see IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001).

65. I have often been asked where “Natural Law” fits in and why I have not treated it as a separate approach. The reason is this: Natural Law proponents seem to me to fall into one of two types. Some are really looking to theology or religion for relevant values, and thus are, in my rubric, another—important—“Law and . . .” school. Others argue that the relevant decisions should be made by particular institutions (the Church, or in Coke's formulation, the courts, see *Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1610)). As such they are best seen as Legal Process practitioners.

approach.⁶⁶ Others, like Critical Legal Studies or Legal Realism, are an interesting combination (mishmash, some would say) of more than one approach. Thus, while some of the Legal Realists are best described as practitioners of "Law and . . ." approaches,⁶⁷ others were really Legal Process scholars, whose concern with which institutions were best suited to decide certain issues happened to be quite different from the later, and more famous, Harvard Legal Process practitioners.⁶⁸ Finally, some of the work of the Realists was closer to what I have described as Law and Status than to anything else.⁶⁹

More recently Critical Legal Scholarship shows an analogous mixture. Some in the school rely heavily on outside disciplines like philosophy, literary criticism, and even economics.⁷⁰ Others like Roberto Unger have appealed for a return to a doctrinalism of the most formalistic sort.⁷¹ Still others, like

66. As opposed to the "old" economic analysis of law of the 1920s and 1930s, which was used to determine whether specific common law or legislative subrules served to achieve the admitted goals of the broader rules they were intended to serve, the "new law-and-economics" sought to use tools derived from economics to analyze, explain, and criticize legal rules that were in no sense self-consciously "economic" in origin. Calabresi, *supra* note 20, at 86; *see also* Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975).

67. *See supra* notes 26, 33 (describing realist's use of empirical science, including institutional economics and psychology).

68. *See, e.g.*, James M. Landis, *Statutes and the Sources of Law*, 213 HARV. LEGAL ESSAYS 1 (1934) (exploring the issue of the judicial updating of statutes). Other realists who focused on the need for greater powers in the federal courts, such as Justice Douglas and Judge Bazelon, might also be understood as taking a process approach. *See* Abner J. Mikva, *The Real Judge Bazelon*, 82 GEO. L.J. 1, 4-5 (1993) (describing Judge Bazelon's belief in a robust role for federal courts and his corresponding dislike of strong standing, ripeness, and abstention doctrines, as well as doctrines that require judicial deference to administrative decisions). Lon Fuller is an interesting figure in this taxonomy, as he produced one of the most influential doctrinalist works in the realist corpus, *see* Lon L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages* (pts. I-II), 46 YALE L.J. 52, 373 (1936-1937), but was at the same time critical of realism's penchant for finding the Ought in the Is, *see* Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 461 (1934), and later turned his attention to process themes. *See* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (originally written 1957-1961).

69. Consider FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1945), and the various realist works on organized labor, *see, e.g.*, Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 785 (1918).

70. *See, e.g.*, KELMAN, *supra* note 28 (law and philosophy, law and economics); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) (law and economics); Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (law and literature).

71. *See* ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 15-22, 88-90 (1986) (advocating an approach called "deviationist" or "expanded" doctrine, which, through a method of "internal development," explicates a field of law as an expression of clashing principles and counterprinciples, works out different relationships between those principles, and generalizes this into a "more comprehensive legal theory" that can be applied to related branches of law).

Duncan Kennedy, are, at least in part, process scholars.⁷² And most have a large element of Law and Status in their work, although their lack of concentration on any given group has caused some more focused Law and Status scholars to criticize them as peripheral sympathizers at best.⁷³

There is nothing odd in all this. For schools and movements are often identified (or self-identified) and named in ways that would cause them to share a single mindedness of theoretical approach only by chance. Sometimes such schools represent generational groups.⁷⁴ At other times they derive mainly from an agglomeration of people in a given law faculty who came to be united by faculty politics—and the worthy goal of obtaining tenure—as much as by anything else.⁷⁵ The name and the definition of themselves as a “school” can often be a form of mutual aid or self-protection, or it can begin as a slur by those who dislike them. Theory does play a role, of course. And usually the “school” is united by a particular dislike of an existing specific manifestation of

72. See, e.g., Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518 (1986).

73. Many critical legal studies scholars have been concerned with class inequality, but they have also addressed race and gender. It may be worth noting that important feminist and antiracist works appear in CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed., 1989), and THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998). Nevertheless, critical legal studies has been criticized for failing fully to come to grips with status hierarchies, such as those of race. See, e.g., Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, in CRITICAL RACE THEORY: THE KEY WRITINGS, *supra* note 57, at 85, 85 (“[M]inority scholars have criticized the failure of the CLS movement to acquaint itself with the history and perspective of those who have, in different contexts, endured the problems of most concern to CLS—problems associated with hierarchy, powerlessness, and legitimating ideologies.”); Harlon L. Dalton, *The Clouded Prism: Minority Critique of the Critical Legal Studies Movement*, in CRITICAL RACE THEORY: THE KEY WRITINGS, *supra* note 57, at 80, 82 (noting critical legal studies scholars’ failure to listen fully to minority voices, but commenting that they are “fellow travelers” and that, with them, “you don’t have to start from scratch in a conversation. You can start at step five or so, and then have an argument.”).

74. Again, the Critical Legal Studies movement provides a good example. As Richard Bauman points out, “[o]ne of the main features of critical legal studies is its fragmentation. There are no uniformly accepted views and no canonical texts.” RICHARD W. BAUMAN, CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE 3 (1996). Its emergence is generally linked to a series of conferences by New Left-type intellectuals, many of whom had spent time at Yale Law School but were then working at various different law schools or in closely related academic settings (legal sociology, legal anthropology). They shared a certain disdain for what they perceived to be the sterile and authoritarian academic legal discourse of the late 1960s and early 1970s as well as a general sympathy with revolutionary leftist ideals (even though they were usually also deeply skeptical of State Socialist regimes). KELMAN, *supra* note 28, at 1. Their “coming of age” is sometimes traced to a 1984 symposium in the *Stanford Law Review*. See *Symposium*, 36 STAN. L. REV. 1-674; see also BAUMAN, *supra*, at 21.

75. For a thoughtful study of how legal movements are negotiated in concrete institutional settings such as the classroom and the faculty meeting, see LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986).

one of the four approaches I have outlined.⁷⁶ Their criticism, in such cases, is frequently highly coherent, even though their own work represents strands taken from widely different approaches and, inevitably, sometimes even of variants of the very approach in reaction to which they came together.⁷⁷

This may make it easy to criticize such schools, not so much on the merits of what its individual members are writing, but because of the sin, unpardonable to many legal scholars, of self-definitional fuzziness.⁷⁸ But such criticism seems to me to miss the point. We should try to have as clear a vision as we can of what approaches to law are extant. But this fact does not mean that we have any right to demand that people individually or as a group hold only to one approach or theory and abjure the others. There is an esthetic attraction to single-mindedness of approach, but it may be that the most accurate view of the cathedral is given by more than one painting, by more than one method.⁷⁹ If that is so for individuals, it surely can also be true for groups of scholars who for any number of reasons like to think of themselves as (or have been tarred as being) a school.

VI. DO WE OWN OUR BODIES—THE DOCTRINALIST'S APPROACH

If what I have just said is true, some may question the utility of describing the four approaches or theories as separate at all. I do so because I think the way in which legal scholars (and judges, for that matter) who are primarily committed to any one of these theories analyze legal questions differs demonstrably from the way scholars who are for the most part followers of another approach will consider the same issues. What they ask, what they think their job is, what sources they look to, what they consider determinative, all these are sufficiently altered by the approach they take, that distinguishing them is, I believe, worthwhile. To indicate this, I will suggest how each of the four theories would look at the question of whether we own our bodies and their parts, or whether, always or at times, these body parts should "belong" to those

76. Recall that Pound's sociological jurisprudence arose as a reaction against the conservative species of legal formalism that reigned in the nineteenth century. See *supra* notes 20-22.

77. For example, the legal realists drew on the very abstract analytical jurisprudence of Hohfeld as well as the very fact-based sociological approach exemplified by the "Brandeis brief" in their critique of the classical orthodoxy. See Horwitz, *supra* note 20, at 164, 182.

78. Cf. ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990) ("An important part of my critique of CLS is based on the idea that there are two incompatible strands of thinking within the CLS literature—one radical, one more moderate. The radical strand rests on indefensible conceptions of language and social reality. The moderate strand rests on conceptions that are largely defensible but from which nothing follows that significantly damages the essential elements of liberalism.").

79. The reference is, of course, to Monet's paintings of the Cathedral at Rouen. To grasp the Cathedral, one must see all of them. See Calabresi & Melamed, *supra* note 35, at 1089 n.2.

who need them. The issue may seem to be one of science fiction, but as several lawsuits have indicated, it is already far from that.⁸⁰ Partly because of its seeming newness, moreover, it is particularly amenable to examination in the light of the different approaches.

A person needs a blood transfusion, a bone marrow transplant, or a new kidney.⁸¹ The most suitable donor declines to contribute it. A lawsuit is brought, or legislative action is sought. How would each theory approach the questions involved?

The doctrinalist would look to the legal landscape, to judicial and legislative decisions that seem analogous, so that what is done here is “like” what is done there. And at first glance the topography seems to be unusually lucid. We are, after all, still primarily a libertarian rather than a communitarian polity.⁸² Autonomy and individualism are powerfully represented in the legal topography however they may have gotten there and however justified or desirable they may ultimately be.

And so the doctrinalist’s initial conclusion would be that we do own our own bodies. For this he or she would cite innumerable “topographical landmarks/precedents” from any number of parts of statutory, constitutional, and common law: the fact that normally volunteering to save someone else’s life is not required;⁸³ the constitutional prohibitions on involuntary servitude;⁸⁴

80. For example, in *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (Ch. Ct. 1978), a man who would surely die without a bone marrow transplant sought an injunction to require Shimp, his cousin, to donate his bone marrow, a procedure which would have posed little risk but considerable pain. The court refused to grant the injunction. See also *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990) (denying a biological father’s request for an injunction to order a mother to produce her twin children for blood testing and possible bone marrow harvesting in order to save the life of their half-brother, who would almost certainly die without a bone marrow transplant).

This issue is raised in a less dramatic form by so-called “presumed consent” statutes. These statutes permit medical examiners to harvest corneas and pituitary glands from cadavers during an authorized autopsy, so long as the examiner is not made aware of the deceased or her family’s wishes to the contrary. Although some statutes require that “reasonable efforts” be made to obtain consent, most commentators agree that, in practice, “presumed consent” often means “forfeiture.” For a discussion of these statutes and the litigation over whether they take property without due process of law, see Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 380-82, 405-09 (2000).

81. Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1 (1994) (“Thousands of Americans die every year for want of a kidney, a heart, a liver, or a pancreas . . .”)

82. See Guido Calabresi, *Liberté, Egalité, Fraternité*, Cardozo Lecture Delivered at the Association of the Bar of the City of New York (Dec. 2, 1996) (on file with author).

83. See *L.S. Ayres & Co. v. Hicks*, 40 N.E.2d 334, 337 (Ind. 1942) (stating that there is no duty to rescue in tort law). A few states, however, impose small criminal penalties in some circumstances. See, e.g., VT. STAT. ANN. tit. 12, § 519(a) (1973) (“A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.”); *id.* (providing for a maximum fine of \$100). For a

the legal sale of blood and hair;⁸⁵ the seeming right to *donate* body parts to those to whom we wish to give them (including, of course, the laws that specify how a person can establish that his or her organs may be used for transplants after his or her death);⁸⁶ the Supreme Court decision that seems to recognize a person's constitutional right to prohibit further medical treatment and to die more or less in peace;⁸⁷ the right to be informed and consent before medical interventions;⁸⁸ and many more.⁸⁹ It is little wonder that the courts that have faced the issue of ownership of body parts have concluded that such parts belonged to their possessors.⁹⁰

On further examination, however, the landscape is by no means so neat; the marks don't all point in one direction. Thus, people can be conscripted into the military against their will and be made to put their bodies to the service of the common good.⁹¹ Once there they may be subjected, without their knowledge,

discussion, see Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991 (2000); Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

84. U.S. CONST. amend. XIII.

85. See Rao, *supra* note 80, at 371-73 (2000) (discussing blood sales and surveying the legal status of other body parts). The sale of ova and sperm is also widespread. Ann Alpers & Bernard Lo, *Commodification and Commercialization in Human Embryo Research*, 6 STAN. L. & POL'Y REV. 39, 41 (1995).

86. See the Uniform Anatomical Gift Act, which has been adopted in some form in all fifty states. Unif. Anatomical Gift Act (1968), 8A U.L.A. 99 (1993).

87. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (suggesting that a competent person has a fundamental liberty interest in refusing lifesaving hydration and nutrition). But see *Washington v. Glucksberg*, 521 U.S. 702 (1997) (distinguishing *Cruzan* and indicating that there may be no fundamental liberty interest in *assisted* suicide).

88. See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (holding that doctors have a duty to disclose relevant information about risks inherent in treatment).

89. The list of doctrinal guideposts could go on and on. One could, for example, note that under the Fourth Amendment and the Due Process Clause, the government may not pump a suspect's stomach in pursuit of evidence, *Rochin v. California*, 342 U.S. 165 (1952), or extract a bullet from a suspect's body over his objections, *Winston v. Lee*, 470 U.S. 753 (1985). But see *Washington v. Harper*, 494 U.S. 210 (1990) (holding that the state may forcibly administer antipsychotic drugs to an inmate if such treatment is reasonably related to legitimate penological interests); *Schmerber v. California*, 384 U.S. 757 (1966) (holding that the forcible bloodtesting of suspects does not offend the Constitution).

90. See, e.g., *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990) (refusing to order blood testing for possible bone marrow harvesting); *McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (Ch. Ct. 1978) (refusing to require Shimp to provide bone marrow to his cousin, although the procedure posed little risk and the cousin would surely die without the donation). I discuss *Shimp* in Guido Calabresi, *Do We Own Our Bodies?*, 1 HEALTH MATRIX 5 (1991). The issue of body part ownership that is my focus here should be distinguished from the (not totally unrelated) issue of the conditions under which persons can be said to have given up their "property" interests in their body parts. See *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (rejecting an action for conversion of spleen cells because the defendant had relinquished his ownership interest in them upon their removal).

91. See *Arver v. United States*, 245 U.S. 366, 238 (1918) ("It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal

to dreadful experiments with drugs, and not even have the right to *compensation*, let alone the right to prevent such a taking of their bodies and minds.⁹² Moreover, individuals may not, in many circumstances, sell some portions of their bodies,⁹³ or the use of them (as in surrogate motherhood).⁹⁴ And in more than a few jurisdictions they are, or were in the past, far from free to destroy them in part (self-mutilation) or in whole (suicide).⁹⁵ Finally, women for the longest of times were obliged to give their bodies to save their fetuses or unborn children.⁹⁶ And some courts in some states have indicated that women may be punished if they don't care for their bodies, that is, make them, for a time, a public utility, for the benefit of their unborn.⁹⁷

Roe v. Wade, of course, cuts strongly the other way, and its language about privacy (autonomy, really) certainly supports the notion that we own the body

obligation of the citizen to render military service in case of need, and the right to compel it.") Similarly, compulsory vaccinations have been upheld as necessary for the common good. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

92. *United States v. Stanley*, 483 U.S. 669 (1987) (holding that no remedy against the state was available to a serviceman who was involuntarily subjected to LSD experiments).

93. The National Organ Transplant Act imposes imprisonment and criminal fines for the knowing purchase or sale of human organs, including kidneys, livers, hearts, and bone marrow, for use in human transplantation. 42 U.S.C.A. § 274 (West 2003).

94. See, e.g., MICH. COMP. LAWS ANN. § 722.859 (West 2003) (prohibiting commercial surrogate parentage contracts); *In re Baby M.*, 109 N.J. 396 (1988) (holding that surrogacy contract conflicted with state public policy and laws prohibiting use of money in connection with adoptions). See also laws against prostitution. See, e.g., N.Y. PENAL LAW § 230.00 (McKinney 2003) (prohibiting the engagement in sexual conduct with another person in return for a fee).

95. For a glimpse into the history of the laws regulating suicide, see *Quill v. Vacco*, 80 F.3d 716, 732-735 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 521 U.S. 793 (1997) (describing the repeal of New York laws criminalizing suicide and attempted suicide and the persistence of the prohibition against assisted suicide).

96. For a history of abortion laws and other fetal-protection regulations, see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

Even after *Roe v. Wade*, doctors and courts have sometimes insisted that pregnant women undergo dangerous procedures for the protection of their fetuses. For example, in one case the trial court permitted a hospital to perform a caesarian section over the objections of a terminally ill woman who was 26 weeks pregnant, when the surgery posed substantial risks to the woman's health but was necessary for the fetus to live. See *In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated*, 573 A.2d 1235 (D.C. 1990) (en banc). See generally Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492 (1993) (observing that such decisions usually affect poor women and women of color). Pregnant *incompetent* women are the most vulnerable, since a majority of states prevents the removal of life-sustaining medical care from such women despite their wishes as expressed in living wills or the recommendations of their designees. See Rao, *supra* note 85, at 409-14 (arguing that these states "literally 'take' the bodies of incompetent pregnant women, treating them as chattel that may be drafted into service as fetal incubators for the state"). The relevance of such cases to "Law and Status," see *infra* Part IX, is obvious.

97. For discussion, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419 (1991).

parts we possess.⁹⁸ But the criticisms of this rationale for *Roe* and the judicial retreat from it in *Casey* indicates that our topography is not single-minded in the matter.⁹⁹ The fact that many who support *Roe*'s result are troubled by its reasoning suggests that its broad language, indicating a constitutional right of ownership of our bodies, as a general matter, may well be an overstatement.¹⁰⁰ If men as well as women became pregnant, antiabortion laws—if we had them—would surely be valid, some have argued. This position, as far as its proponents are concerned, means that *Roe*'s statement of ownership of our bodies cannot be taken as reflecting an absolutist, libertarian right over our own body. To the contrary, these proponents would say, certain deviations from the prevailing libertarian legal topography may well be valid, but they are, at the least, constitutionally doubtful when they are made in a way that burdens members of discriminated-against groups, when they result in suspect classifications. This would mean that what *Roe* really stands for is a prohibition of *discriminatory* taking of *women's* bodies for the alleged common good, and not a prohibition of universal, nondiscriminatory appropriations for that purpose.¹⁰¹

Thus doctrinalists would probably conclude, if truly honest in their search for legal consistency and in their abjuring of personal values, that our starting point is ownership of our own bodies and their parts. But the same doctrinalists would most likely have to concede that such a starting point is not so firm that deviations from it, at times judicial and more often legislative, would necessarily be unconstitutional or in other ways anathema to the system. A statute that made some body parts (say blood, bone marrow, or even perhaps kidneys) available to those who need them would be valid, especially if there

98. 410 U.S. 113 (1973). For a different rationale for *Roe* that might be applicable to the issue of forced body part transfers, see Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. REV. 480, 523 n.184 (1990) ("[A statute that compelled parents to donate organs to their children] would at least raise serious thirteenth amendment difficulties. An argument for its validity would have to stress the relatively short duration of the invasion and the magnitude of the interest: unlike fetuses, the children whose lives would be saved are indisputably persons.").

99. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (restricting *Roe* and upholding certain informed-consent and parental-consent requirements); cf. *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a statute that prohibited so-called partial birth abortions because the statute lacked a maternal-health exception).

100. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (questioning, though not rejecting, *Roe*'s autonomy rationale and lamenting the Court's failure to cite women's equality interests).

101. For an elaboration of the equality argument for abortion rights, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Siegel, *supra* note 96. For my own thoughts on the superiority of the equality perspective over the privacy perspective, see GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 87-115 (1985).

were some dramatic public need, like a generalized Chernobyl.¹⁰² Of course, if that law required such forced donations only from women (or from other groups derived in a “suspect” way), that would likely be a very different matter.¹⁰³

It is not my object here, however, to delve fully into the issue of ownership of body parts—or even to do so just from the standpoint of those committed to law as an autonomous discipline to be studied with an eye to doctrinal coherence. Rather, it is to compare that approach with others. How would these analyze the question?

VII. DO WE OWN OUR BODIES—THE “LAW AND . . .” VIEWPOINT

The “Law and . . .” scholar would look at the issue of body parts in a totally different way from the doctrinalist. He or she would not be much interested in existing legal doctrine, in the topography, except insofar as it indicated something relevant to the underlying discipline (or mix of disciplines) that the scholar was relying on. Thus to the lawyer-economist existing practice could serve as an indication of what had come to be viewed as efficient under past technologies (but might no longer be so). Or it could raise questions about the costs of changing to a new approach. It would in no way, however, preclude an independent examination of what would today be an efficient allocation of, and “entitlement” to, body parts.

Again, this is not the place to make even a start toward a thorough legal-economic analysis of the question. The types of things the lawyer-economist would ask, however, can be mentioned. Is a market for body parts likely to reach efficient results, or is it highly inefficient? Often, both the “possessor” and the “would be transplant recipient” are unique! The body part is useful only to these two, and so a bilateral monopoly exists. At other times only one of the parties would have substantial monopoly power if the entitlement belonged to him or her. In either case, bargaining is not easy.¹⁰⁴ Given these difficulties of negotiation (transaction costs)¹⁰⁵ between the person who has and the one who needs good body parts, is it more efficient to start with

102. The Chernobyl nuclear reactor, located in the USSR, exploded in 1986, releasing 50 tons of evaporated nuclear fuel into the atmosphere. See GRIGORII MEDVEDEV, *THE TRUTH ABOUT CHERNOBYL* (Evelyn Rossiter trans., 1991).

103. *But cf.* *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that the exemption of women from registering for the draft does not violate the equal protection component of due process). See also *infra* Part IX.

104. *Cf.* James N. Morgan, *Bilateral Monopoly and the Competitive Output*, 63 Q.J. ECON. 371, 391 (1949) (describing bargaining problems and resulting inefficiencies caused by bilateral monopolies).

105. See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). I elaborate on this crucial concept in Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991), and Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—a Comment*, 11 J.L. & ECON. 67 (1968).

entitlements in those who have more than they need, or in those who need what they don't have?¹⁰⁶

Most people have more blood and bone marrow than necessary, they even have one more kidney than they normally require. Would it be more efficient if ownership in these were placed in those who needed them instead of those who possessed them? What, however, would be the consequences in terms of caring for body parts if the "care takers" (those who possessed them) were doing so for the required benefit of others, rather than for their own good or to protect a potentially saleable asset? Would people, under such circumstances, fail to look after their "replaceable" organs?¹⁰⁷ Some lawyer-economists might argue that they would.¹⁰⁸ More empirically based ones would probably look further and might conclude that the opposite was true, because lack of care entailed too many other irreparable costs to the "careless" one. This would be so if the same carelessness that injures a replaceable kidney would likely damage an irreplaceable heart or brain as well.

Different schools of lawyer-economists would, of course, ask different questions. Thus "Yale" lawyer-economists would probably focus also on the distributional consequences of ownership of body parts by the possessors as against those in need.¹⁰⁹ Would wealth and wellbeing be more evenly distributed if those in need were entitled to body parts than if the entitlement was in those who have them in superfluity? What would the effect be on the person who has exceedingly rare blood? If he or she owns it, that person will be immensely rich. If it is owned by those who need the blood, the possessor of rare blood would become a public utility, a cow to be milked. What kind of compensation, if any, would then be appropriate and who should pay it? "Chicago" lawyer-economists might well abjure these questions.¹¹⁰ Finally,

106. Almost as important as deciding who will have the entitlement is the question of how that entitlement will be enforced. If I have "ownership" of one of your kidneys (because, say, I need it more than you), I might be entitled to an injunction to have it surgically removed from you (a property rule) or I might merely have the right to receive damages if you refuse to consent to a transplant (a liability rule). See Calabresi & Melamed, *supra* note 35.

107. Cf. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

108. A similar fear is that the increased availability of transplantable organs would induce some people to engage in more health-risking behavior. It might also be interesting to consider how a regime that makes organs available to those in need might create political support for universal health care, since everyone would become a potential donor and hence a resource to be protected for the common good.

109. See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 25 (1978) (discussing "corrected egalitarianism," under which maximally efficient allocative criteria must be modified where they impose burdens, on particular groups, that are deemed unacceptable by the relevant polity); Calabresi & Melamed, *supra* note 35 (stating the importance of considering the distributive consequences of any given entitlement set).

110. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (arguing that wealth-maximization is the goal of a just society); see also LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002) (arguing that efficiency is the sole measure of a policy's worth).

those lawyer-economists influenced by Critical Legal Thought would probably seek to determine the effects on the values and tastes of the society of a starting point in which we were required to help (with our body parts) those in need, as against one in which we could refuse to do so, and let such people die.¹¹¹

Many, many other questions would be asked. The cost of compulsion (either way) would be one. That is, one would compare the cost of seeing the person who cannot get the needed transplant chain himself or herself to the White House fence with a sign, "Why are you letting me die, why will no one help?," with the cost of making people come in and be tested for organ compatibility and ultimately be pressured or even compelled to donate organs.¹¹² Similarly, the advantages and disadvantages of open markets, as against both limited ones (donations but not sales, sales after death but not in life), and collective allocations, would be considered ad nauseam.¹¹³ The

111. See KELMAN, *supra* note 28, at 126-37 (discussing the difficulties with basing entitlements on tastes, since tastes are contingent and change in response to different entitlement schemes).

112. Cf. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (describing one facet of "demoralization costs" as the lost future production, due to impaired incentives or social unrest, caused by the demoralization of those persons subject to an uncompensated governmental taking, their sympathizers, and other observers "disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion").

113. See, e.g., Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45 (1995). Banks surveys a range of options, including a market for organs from living providers (which could be largely unregulated or could include price and quality controls); a futures market for posthumous organs (again, there are a range of possible features, such as price controls or the requirement of in-kind payment); a mixed donative/commercial system that reserves donated organs for the indigent; or a market approach that combines government-provided organ vouchers for indigent recipients. (The classic general work on different possible limits on the right to alienate one's entitlements is Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).)

For the argument that persons should be permitted to sell one of their kidneys while alive, but that only public-interest agencies, not persons in a market, should be allowed to purchase and later allocate them, see Michael B. Gill & Robert M. Sade, *Paying for Kidneys: The Case Against Prohibition*, 12 KENNEDY INST. ETHICS J. 17 (2002) (arguing that their proposal would increase the supply of available kidneys without significantly decreasing donations, the majority of which are made between family members). For the case in favor of futures markets, see Roger D. Blair & David L. Kaserman, *The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 YALE J. ON REG. 403 (1991); Crespi, *supra* note 81 (advocating a futures market and claiming that cadavers alone would provide sufficient quantities of organs to meet existing and projected needs); Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57 (1989).

Of course, markets in live and posthumous organs already exist—albeit illegally. And in some countries, such as China, India, Israel, Iraq, Russia, and Turkey, these markets are, apparently, only faintly secret. Thus, it is said that "[i]n Israel, there is even tacit government acceptance of the practice—the national health-insurance program covers part,

object, of course, would be the same, to obtain some sense of what the rules ought to be and to avoid being guided, as the doctrinalists are, by the assumption that the values of the system are to be found by examining the existing rules and doctrines themselves. That is, the aim is to reject the notion that a consistency of rules, with each other and with the endogenous values those rules represent, is the object of legal scholarship, and is in a sense the primary value to which such scholarship is dedicated.

Other "Law and . . ." schools would approach the issue of ownership of body parts with the same objective that lawyer-economists have. But the sources that they would look to for guidance would be quite different. A Law and Philosophy scholar would likely also seek to determine what the doctrines, the rules, ought to be. What questions he or she would ask would, of course, depend on the particular school or schools of legal philosophy the scholar was wedded to or relied on. And these can vary widely. A couple of examples will suffice to make my point.

The Law and Philosophy scholar devoted to John Rawls's approach to justice and fairness would likely ask how we would decide the ownership of body parts if we were asked that question behind a veil of ignorance.¹¹⁴ If we did not know whether we were to be those who had good body parts or those who needed them, what rules would we establish? This is what should guide us. *Not* what a majority (which, let us assume, has good body parts) would vote for, or has, over time, made into legal doctrines.¹¹⁵ The result might be that behind the veil we would decide that blood and bone marrow should belong to those who need them. Maybe the extra kidney should, too, but perhaps only if the remaining kidney could be replaced, without undue risk, whenever the need arose, and even then, only if some compensation were made

and sometimes all, of the cost of brokered transplants." Michael Finkel, *This Little Kidney Went to Market*, N.Y. TIMES, § 6 (Magazine), May 27, 2001, at 26.

More recently, the United States has seen the emergence of nonmoney "markets" for organs. In 2001, the New England Medical Center launched the "Hope Through Sharing" program, which expedites a patient's wait for a kidney if a loved one donates an incompatible kidney to the general pool. The program's purpose is to allow family members and others to help those they love despite a lack of organ compatibility. The expedited status would not trump medical emergency or other special cases that constitute a very low percentage of those on the waiting list. See Press Release, Tufts-New England Medical Center Unveils First-in-Nation Transplant Exchange Program: Mother Donates to Stranger to Save 12-Year-Old Son (Apr. 11, 2001), available at <http://www.nemc.org/home/news/pressrel/2001/01041101.htm>; see also Jose A. Lopez, *Creative Organ Donations Attempt to Shorten Wait*, CONTRA COSTA TIMES, Oct. 27, 2002 (reporting that other hospitals are trying similar measures).

For an early treatment of both illegal "fringe" markets and nonmoney markets, see CALABRESI & BOBBITT, *supra* note 109, at 83-127.

114. See JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

115. To be more precise, a Rawlsian would first use the veil of ignorance device to derive principles of justice and would then apply these principles (which speak to the amount to which we should sacrifice for one another) to concrete problems, such as organ allocation.

to the donors. Similarly, behind the veil, we might well choose to assign postdeath body parts to the needy who were alive.¹¹⁶ At the same time, we might not be inclined—even behind the veil—to countenance required assignment, during life, of those body parts—like hearts, or brains—without which the donor would die or be, in some sense, a different person.¹¹⁷

Again, others might read Rawls and what would happen behind the veil differently. All sorts of other questions about worthiness of donors and donees could be asked. Issues, about who the least favored groups really are—when talents and bodies as well as wealth are involved—would also undoubtedly arise.¹¹⁸ And, of course, other philosophical schools would reach quite different results. Some Kantians, citing the maxim that individuals must never be used as means but only as ends, would readily require that body parts be owned by their possessors.¹¹⁹ Some philosophical Christians—or Marxist originalists for that matter—might well conclude the opposite, that we all owe what we have and even what we are to those who need us!¹²⁰

116. A more limited (or subterfuge, some would say) version of this approach may currently be accomplished through presumed-consent statutes. See *supra* note 80 (discussing such statutes); Black, *supra* note 113, at 71 (noting the arguments made by some for a compulsory organ draft system because the presumed consent statutes currently achieve the same result due to the public's lack of awareness of the need to "opt out").

117. Cf. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1879-81 (1987) (arguing that certain forms of alienability are illegitimate because they threaten personhood); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

118. See RAWLS, *supra* note 114, at 65-73 (explaining the difference principle, which permits inequalities in income distribution insofar as they advance the position of the least well-off in society). Currently, decisions as to who may be an organ recipient are sometimes based on problematic "social worth" criteria, which seek to determine whether the recipient will be a productive citizen after the transplant. These criteria include marital status, income, and educational and employment background. See Banks, *supra* note 113, at 63 (discussing these criteria); see also CALABRESI & BOBBITT, *supra* note 109, at 186-89 (noting and criticizing the use of such criteria).

119. Cf. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 55 (1971) ("If I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow, then all the same, I have no right to be given the touch of Henry Fonda's cool hand on my fevered brow. It would be frightfully nice of him to fly in from the West Coast to provide it. It would be less nice, though no doubt well meant, if my friends flew out to the West Coast and carried Henry Fonda back with them. But I have no right at all against anybody that he should do this for me. Or again, to return to the story I told earlier, the fact that for continued life that violinist needs the continued use of your kidneys does not establish that he has a right to be given the continued use of your kidneys. He certainly has no right against you that *you* should give him continued use of your kidneys. For nobody has any right to use your kidneys unless you give him such a right; and nobody has the right against you that you shall give him this right—if you do allow him to go on using your kidneys, this is a kindness on your part, and not something that he can claim from you as his due.").

120. RICHARD J. CASSIDY, *SOCIETY AND POLITICS IN THE ACTS OF THE APOSTLES 25-32* (1987) (describing the early Christians' "community of goods," in which all things were held in common and distributions were made to the poor); KARL MARX, *Critique of the Gotha*

But all this is to the side. The point that is central to my thesis remains: Like Law and Economics, Law and Philosophy looks to outside sources for a critique or an affirmation of the rules found in existing legal doctrine. It does not, without much more, rely on the current majority, or on what has come to be, as the guide to law. It does not suggest that deviant rules should, on the whole, be made to conform to this fabric. What Law and Philosophy looks to for guidance is very different from what Law and Economics, Law and Psychiatry, Law and Literature,¹²¹ or some highly sophisticated complex mixtures of law and other fields would examine. Like these, what it would lean upon would depend on what variant, what school of Law and Philosophy, was being followed. The underlying approach would be the same, however, in its view of the role both of legal scholarship and of the legal scholar. It would be identical regardless of what the "Law and . . ." school was, and it would be totally different from the methods used by the doctrinalists.

VIII. DO WE OWN OUR BODIES—THE LEGAL PROCESS QUESTIONS

With both of these one can usefully compare the approach taken by the Legal Process scholar. Are questions of ownership of body parts best decided in the first instance, and ultimately, by legislatures, courts, administrative agencies, or in an ad hoc way by juries?¹²² What skills, and what biases, do each of these bring to the process that would lead us to favor some and abjure others? Are there complex scientific issues involved that would require experts? Is this the kind of question best decided in a highly individualized, fact-centered way, so that a common law court, perhaps aided by a jury, would be good? Or is it one of those decisions that is best made, fairly abstractly, at a high level of generalization so that legislatures would be more suitable?¹²³ Do

Program (1891), reprinted in *THE MARX-ENGELS READER* 531 (Robert C. Tucker ed., 2d ed. 1978) ("From each according to his ability, to each according to his needs!").

121. Law and Literature scholars look for guidance to the values exemplified in the great canonical works found in a polity's literary heritage rather than in the analytical framework of a "social science." But what they do with those values in affirming or criticizing legal rules is quite similar to other "Law and . . ." schools. Law and Status scholars will also look to great literary works, but they are likely to criticize the canon! See, e.g., Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 *YALE L.J.* 1913 (1990) (critiquing major strands of law-and-literature scholarship for placing too much emphasis on the male-centered literary canon).

122. For a discussion of the advantages and disadvantages various institutions have in allocating tragically scarce resources, see CALABRESI & BOBBITT, *supra* note 109.

123. Of course, the optimal structure might be multitiered. For example, it may be that the initial policy questions regarding body part ownership could best be answered by the legislature, not the courts. This is what the California Supreme Court held when it declined to extend the tort of conversion to the context of human cells removed for medical research purposes. *Moore v. Regents*, 793 P.2d 479, 496 (Cal. 1990) (stating that such a policy question is one for legislatures because they "have the ability to gather empirical evidence, solicit the advice of experts, and hold hearings at which all interested parties present evidence and express their views," but not, thereby, explaining why the starting point from

the same patterns recur, so that longstanding bodies devoted to precedent (like courts) are needed to guarantee similarity of treatment? Or are most cases different and dependent on highly particularized facts, so that juries or administrative agencies would be called for?¹²⁴

What about the selection and makeup of each of these possible decisionmakers? Does someone chosen at large across the polity, in an almost plebiscitary way, best reflect the people's wishes on whether the blood or bone marrow I have should belong to me or to you who needs it? Or is this the kind of question that is best worked out by power blocks in legislatures, trading off the intensity of desire among a relatively small group of needy against a weak, but majoritarian, aversion that might yield if other things that some in the majority care more deeply about were conceded?¹²⁵ Is it, perhaps, one of those issues which only very few people are likely to lobby for ahead of time—before they know they will be in need? If so, even if over time a large number of people—perhaps a majority—would find that they wished at least some body parts to belong to those in need, at any given moment, there would never be more than a very small group pushing for such a rule.¹²⁶ In such cases, majoritarian bodies, like executives and legislatures, may be far less suited to decide on entitlements than courts. For these can act retroactively, and can

which such a statute would be written should be that favoring the defendant rather than the plaintiff in *Moore* (quotation marks and citations omitted)). That legislature might, however, decide to enact a statute that incorporates guidelines that are broad enough to enable courts to take account of factual nuances posed by each case while still assuring regularity in treatment through the creation of precedents. The courts might then, in turn, utilize experts or special masters to advise as to the medical determinations required by the statute. A statutory scheme might also call upon juries to make particular determinations while giving courts more or less power to override these determinations.

124. In *Tragic Choices*, Philip Bobbitt and I discussed the virtues and drawbacks of what we called “parajuries.” See CALABRESI & BOBBITT, *supra* note 109, at 57-79. These institutions are characterized by four features: They are decentralized (i.e., they make individualized decisions), they give no reasons for their decisions, they seek to be representative, and they last long enough so that they can allocate goods (i.e., choose among potential recipients). Such decisionmakers are often used in making allocative decisions involving tragically scarce resources because of their relatively popular pedigrees and because, in such circumstances, the explicit enunciation of the allocative criteria (or lack thereof) would be politically destructive. As examples, we discussed the “Seattle God Committee,” which was charged with allocating access to scarce kidney dialysis machines, and the, at times, unfettered discretion of wartime draft boards. We noted that these institutions have a tendency to become (or be popularly perceived as having become) arbitrary, biased, or corrupt, and proposed some modifications to ameliorate these problems. Ultimately, we concluded that, both in their original and modified forms, parajuries have only limited usefulness in the resolution of tragic dilemmas.

125. The insight that aggressive minorities can achieve legislative success against the wishes of an unorganized or unfocused majority is a common place in the pluralism literature, but it has taken on a new significance in public choice scholarship. For an overview, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

126. See *supra* text accompanying notes 114-18 for links between this and John Rawls's notions of justice and fairness.

look retrospectively as they consider the equity (including the intensity) of the claim of the individuals seeking "justice," or at least fair adjudication, before them.

All these, and many more, are the questions that the Legal Process scholars would raise. Obviously, the answers such scholars would reach with respect to what institution is best suited to decide the issue of body part ownership would not only be based on the facts that these institutions need to determine. They would also depend on issues of values relating to ownership of bodies. And that is why, as I said earlier, Legal Process has trouble standing by itself.¹²⁷ But after assuming (explicitly or implicitly) some range of values, some notions of rights (which may be internal to the system, or exogenous to it), the Legal Process scholars can happily focus their attention on the kinds of issues of institutional suitability or capacity that I have described. Legal scholarship, so defined, will perform an enormously important task in helping us resolve the question of ownership of body parts. For it both collects and analyzes critically a lot of information that can guide the polity in determining who ought to decide the question under different circumstances. And the scholars who practice this approach manage to *seem* quite neutral in doing so.

Neutrality becomes considerably more dubious when Legal Process scholars face the possibility that those in need of good body parts (or those who have them and may be compelled to give them, for that matter) on occasion are members of exploited, disadvantaged, or otherwise discriminated-against groups. If those in need, or if the would-be-compelled donors, are not randomly distributed among the polity, but instead share characteristics that have made them the object of exclusion from majoritarian bodies like legislatures, or from other centers of power in the polity, then the Process scholars' approach seems particularly apt. But the questions posed are immediately value laden.¹²⁸ And this is so whether the source of the exclusion is linked historically to, or is totally independent of, that which makes members of the excluded group particularly good donors (or particularly needy recipients) of body parts.

Women may well have been historically excluded and discriminated against, in significant part, because they become pregnant,¹²⁹ i.e., are the ones whose bodies must be used for the benefit of fetal/unborn lives if anyone's bodies are to be so used. Conversely, the reasons for discrimination against, and exclusion of, African Americans and Jews are quite independent of the existence of a recessive sickle cell anemia gene, or of a recessive tay-sachs

127. See *supra* note 53 and accompanying text.

128. See ELY, *supra* note 39, at 152-54 (arguing that courts should scrutinize legislation that burdens groups that are objects of widespread social hostility). But consider Brest and Tribe's criticism, see sources cited *supra* note 48, that this process approach presupposes a substantive theory of equality.

129. See Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991).

gene. And they would remain so, even if the existence of such genes made African Americans or Ashkenazy Jews especially suited to be blood, kidney, or bone marrow donors (or particularly in need of such transplants).¹³⁰ Either way it is the exclusion of, and the discrimination against, the group, not its link or nonlink to suitability for body part domination, that affects which institutions are most suited to decide for or against ownership of body parts by their possessors.

Legal Process scholars will typically focus on this last question. They will ask whether discrimination will imply greater lack of power and greater inability to be listened to, in judicial or in legislative contexts. And they will consider which institutions (courts, legislatures, executives, or others) are most capable of overcoming past prejudices and still take into account the, perhaps very real, needs of society for a particular body part ownership rule.¹³¹ They will, in other words, examine which institutions can decide best whether a rule that has significant differential impact is, nonetheless, appropriate or is based instead on prejudice or powerlessness. That is, the fact that a discriminated-against and excluded group is being asked to bear an undue burden must create deep suspicion. It must also require us to see to it that whoever allocates the burden be as immune from the bias and the pressure of interested constituents as possible. It does not necessarily mean that the burden is improperly placed on the excluded group.¹³² It may be that analogous burdens are, in fact, borne by nonexcluded groups, or that no analogous burden is available, but that, if

130. Sickle cell anemia is found primarily in this country among African Americans, Tay-Sachs among Ashkenazy (usually German and Eastern European) Jews. See NAT'L HUMANE GENOME RESEARCH INST., LEARNING ABOUT SICKLE CELL DISEASE, at <http://www.genome.gov/10001219> (noting that approximately one in twelve African Americans carries the sickle cell trait); NAT'L HUMANE GENOME RESEARCH INST., LEARNING ABOUT TAY-SACHS DISEASE, at <http://www.genome.gov/page.cfm?pageID=10001220> (noting that approximately 1 in 27 Jews in the United States is a carrier of the Tay-Sachs gene).

131. The notion that, in determining the optimal decisionmaking body, the personal characteristics of the decisionmakers, and therefore their biases, are as important as is the nature of the questions the decisionmakers are called on to answer was pointed out by Richard Nixon in an article that he wrote while a student at Duke Law School. See Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476 (1936) (analyzing the roles of courts and juries in torts cases). His article was early recognized as an important example of legal realist writing, and an excerpt was included in a major torts casebook long before Nixon became a significant political figure. See HARRY SHULMAN & FLEMING JAMES, JR., CASES AND MATERIALS ON THE LAW OF TORTS 198-200 (1st ed. 1942).

132. But the presence of this burden does oblige the courts to undertake an independent, searching inquiry into the law's justification, as opposed to merely taking the legislature's word for its necessity. See Calabresi, *supra* note 50, 93-94 (noting examples where courts improperly deferred to legislatures when confronted with laws that imposed suspiciously unequal burdens).

one were, it would be willingly borne by the nonexcluded groups in order to achieve a greatly desired result without discrimination.¹³³

The fact that men don't become pregnant must make antiabortion laws suspect. But one must at least consider the possibility that even if men did become pregnant, the majority of them would vote for antiabortion laws to save fetuses. If an analogous lifesaving burden *can* be placed on men, a test of this willingness may be available (and could be required).¹³⁴ If it is not, one must at a minimum require that the decisionmaker with respect to antiabortion laws be as responsive as is possible in that society to those that bear the burden (that is, be the least prejudiced against, or exclusive of, women and depend as little as possible for its authority on those that are).¹³⁵ But, the Legal Process scholar would probably conclude, one cannot *require* that they invariably decide that the burden be not borne.¹³⁶

As with the other approaches mentioned, this discussion does not pretend to be a full consideration of how Legal Process scholars would deal with body part ownership. And it does not even begin to examine the richness and variance among different schools and practitioners of this approach. My object, instead, is, once again, primarily to point out the similarities of method among different legal process adherents and the profound difference between all of these and those who are devoted to doctrinal or "Law and . . ." methodologies.

IX. DO WE OWN OUR BODIES—LAW AND STATUS

The Law and Status scholars' way of considering issues can readily be contrasted with all three of the methods previously discussed. To such scholars the question, pure and simple, is: How do the *current and past rules* concerning ownership of body parts affect members of the group with which they are concerned, how would these effects be different if the rules were decided upon by *different institutions*, and what do *other disciplines*, tell us

133. *Id.* at 94-96.

134. *See id.* at 96 n.43 (discussing, in the abortion context, the various forms that men's forced labor for the benefit of children might take).

135. It is, however, very difficult to determine when a decisionmaker is sufficiently representative of a group or, alternatively, sufficiently unprejudiced. Invariably, judgments about prejudice will be bound up with substantive judgments about the underlying issues at stake. *See* Nixon, *supra* note 131 (demonstrating this very flaw). There is also the possibility, as suggested even by Ely himself, *see* ELY, *supra* note 39, at 165, that minority members suffer from "false consciousness" as a result of their oppression. If so, it may be that substantive judgments are inevitable, even if made under the guise of assuring procedural fairness or "process" suitability.

136. *See* ELY, *supra* note 39, at 169-70 (arguing that if women are able to protect themselves in the political process, but choose not to, "[m]any of us may condemn such a choice as benighted on the merits, but that is not a constitutional argument"). *But see* Brest, *supra* note 48, at 141 (arguing that the right to equal treatment is a *personal* right, which should not turn on whether the majority of one's group has chosen to "protect itself").

about the actual effect and normative consequences the rules have on the relevant “status” groups?¹³⁷ Thus, feminist scholars would focus on whether women, by and large, bear burdens, derive benefits, or are affected neutrally as a result of legal rules which make blood, kidneys, and bone marrow belong to those who possess them as against those who need them.

They would then contrast these with other rules that might treat other body parts differently and explain how this different treatment affected women in ways other than men. Antiabortion laws, and laws requiring women “to take care of themselves” to avoid damaging fetuses would be prime examples.¹³⁸ These, in turn, would be compared with rules that failed to make rape a crime within a marriage.¹³⁹

The issue of the entitlement to sell some, but not all, body parts (generally those, like blood and hair, which replace themselves), would be considered in the light of prohibitions on prostitution.¹⁴⁰ The fact that often these last are in practice not enforced against “the buyer” but only against “the seller,” would be compared with how buyers and sellers of body parts are, or are proposed to be, treated.¹⁴¹ And differential treatment, as to each of these, between male and female prostitution would be examined.¹⁴² The question of surrogacy in

137. It should be obvious that Law and Status scholars do not employ a unique method; rather, they put doctrinalist, “Law and . . .,” and process approaches to work in their efforts to understand how the law affects certain groups. For this reason, it may be said that Law and Status operates at a distinctly different level of generality than the other approaches I have described.

138. The diversity of methods employed by Law and Status scholars bears emphasis. Some scholars, for example, use doctrinal methods to plot the historical development of abortion and other fetal-protection laws, *see, e.g.*, Siegel, *supra* note 96, while others employ a legal process approach to explain in what manner courts may intervene to correct for gender-based distortions in the political process, *see* Ely, *supra* note 39, 164-70 (arguing that legislation burdening women that was passed years ago when women had insufficient access to the political process may legitimately be judicially “remanded” to the more women-inclusive legislatures of today for “a second look”).

139. For a discussion of the marital exception, *see* Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990) (employing doctrinal and legal process approaches to argue that the marital exception violates equal protection and that Congress is the superior institution for addressing these constitutional violations).

140. *See* Khiara M. Bridges, *On the Commodification of the Black Female Body: The Critical Implications of the Alienability of Fetal Tissue*, 102 COLUM. L. REV. 123 (2002) (discussing issue of whether fetal tissue should be saleable in light of prohibition on prostitution and restrictions on surrogacy contracts). For a law-and-philosophy and law-and-economics discussion of markets in organs, sexual services, and reproductive services, *see* MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

141. *See* MARY JOE FRUG, *POSTMODERN LEGAL FEMINISM* 133 (1992) (describing the sometimes brutal character of police enforcement against prostitutes and the comparatively lax enforcement against customers).

142. Equal protection challenges to the police’s harsher treatment of female prostitutes, as compared both to male prostitutes and male customers, have usually failed. *See, e.g.*, *People v. Superior Court*, 562 P.2d 1315 (Cal. 1977).

motherhood would, of course, be used to shed light on these questions as well.¹⁴³

The analysis would spread beyond these obvious areas, however. The fact that men's bodies are requisitioned by the state (in military conscription) would be significant. But so would the status and compensation accorded (veteran's benefits and educational programs like the G.I. Bill of Rights), to those subjected to such takings.¹⁴⁴ And the economic and sociological effects of such diverse treatments would be analyzed not only for their distributional but also for their efficiency consequences.

The historical relationship between women and men's rights to economic property would be looked at for analogues to women and men's ownership of body parts in the same periods.¹⁴⁵ The types of things which constituted bodily takings, and gave rise to tort damages, would be examined, with a view to discerning how rules that seem nominally similar ended up treating injuries to women differently from injuries to men. One example would be the linking of damages to lost earnings, at a time when the social structure made minimal the likelihood that women would have significant earnings.¹⁴⁶ The nature of the decisionmakers responsible for these rules would be considered, as might economic incentives and efficiency effects of the rules.

Similarly, the fact that injuries to a man's sexual capacity was for the longest of times taken as harming him but not his spouse, would be contrasted to the very different treatment of injury to a woman's sexual capacity which traditionally gave rise to significant damages to her husband (the "owner" of it?).¹⁴⁷ The dominance, and ultimate decline, of the cause of action for alienation of affection, in which (usually male) spouses sued others for "taking" their mates—or "possessions," would also be part of the picture. What lawmaking bodies were responsible for the decline, what not inconsiderable role the literature on the subject played in that decline, as well as the efficiency

143. See Bridges, *supra* note 140, at 145-51 (discussing surrogacy and fetal tissue sales). For a feminist critique of surrogacy that employs a law and philosophy approach, see Margaret Jane Radin, *What, If Anything, Is Wrong with Baby Selling?*, 26 PAC. L.J. 135 (1995).

144. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499 (1991) (discussing the symbolic relationship between full citizenship and military service).

145. For a history of the legal topography of women's rights to hold property, see NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982).

146. Elaine Gibson, *The Gendered Wage Dilemma in Personal Injury Damages*, in TORT THEORY 185, 191-202 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993) (describing the linking of tort damages to lost income in the context of late-nineteenth-century industrialization and critiquing the undervaluation of women's injuries under this regime).

147. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 48-51 (1989) (describing the persistence of this rule until the 1950s).

and taste-shaping significance of the old and new rule, would all be analyzed.¹⁴⁸

Through all of these, and more, a legal topography would be developed which might indicate that ownership of bodies was treated in very different ways when men and women were involved.¹⁴⁹ How this had come to be, the degree to which it still remained true, and the effect, on those rules that continue to show differences, that would likely follow from a determination that blood, bone marrow, or kidneys should belong to the possessor, instead of to the person who needed them, would all be central to this kind of legal scholarship. But so too would a consideration of what extralegal sources of values—economic, literary, psychological, and so forth—would be most helpful in reaching the “proper,” or at least the most-informed, decision with respect to body part ownership, viewed from women’s perspectives. As germane, of course, would be discussion of which institutions could view the legal issues with women and their particular histories and needs in mind, and which could not.

As with the differences between variants of the “Law and . . .” approach (lawyer-economists compared with lawyer-philosophers), different Law and Status scholars would look at widely varying preexisting rules for the light they could shed on the legal landscape and on the questions to be decided today. For the Race and Law scholar, the fact and law of slavery and all its continuing subsidiary effects (differential treatments of white and black victims and victimizers in rape and in murder, for example) would be central.¹⁵⁰ For here

148. See Susan McCoin, *Law and Sex Status: Implementing the Concept of Sexual Property*, 19 WOMEN’S RTS. L. REP. 237, 241 (1998) (developing a feminist critique of alienation of affection). Nine states have retained some form of this tort, and some scholars argue for its revival. See William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 989 n.7 (2001). The cause of action for alienation of affection and the, not unrelated, breach of promise suit played a significant role in such diverse “literary” works as JOHN GALSWORTHY, *THE FORSYTE SAGA* (1922), and G.S. GILBERT & ARTHUR SULLIVAN, *TRIAL BY JURY* (opera) (Bryceson Treharne ed., 1941) (1875).

149. Feminists taking a doctrinalist approach to the issue would no doubt go on to cite a number of additional constraints on women’s bodily autonomy. They might, for example, note that the *Lumley* injunction, which restricts an employee’s rights to sell his or her services as a remedy for breach of a labor contract, was in part born of nineteenth-century views of women’s limited rights of autonomy over their bodies. See Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men’s Consciences and Women’s Fidelity*, 101 YALE L.J. 775 (1992). Indeed, doctrinalists of all persuasions invariably confront the problem that the universe of relevant topographical landmarks is logically unlimited—every landmark, it can be argued, bears on the issue at hand in at least some way. Therefore, doctrinalist disputes commonly center on how to define that universe, and whether these limits are themselves supplied by the legal landscape (raising issues of circularity) or by exogenous values (thereby requiring some sort of “Law and . . .” approach).

150. See, e.g., WILLIAMS, *supra* note 57, at 181-238 (discussing the importance of autonomy rights in light of the history of black slavery); Bridges, *supra* note 140 (arguing

explicitly, and on the basis of race, the possessors for centuries did not own their bodies and their parts. And—consistently with the lawyer-economist's likely analyses—beauty and strength became curses rather than benefits to those who had them, but only for the use of others.¹⁵¹ Poverty lawyers would focus on the fact that the poor were induced (compelled by hunger?) to sell their bodies into service in extremely dangerous occupations, including of course wartime military service. They would compare this with our alleged unwillingness to permit the sale of body parts and ask who—rich or poor—gets the bulk of those parts that are made available today.¹⁵² Similarly, the fact that “laborers” allegedly do very badly on artificial kidneys, but may have the same

against a market in fetal tissue because black women would be disproportionately exploited due to racism and poverty).

151. The recollections of surviving slaves, gathered during the early New Deal by the Federal Writer's Project of the Works Progress Administration, are full of accounts that bear this out, *see* UNCHAINED MEMORIES: READINGS FROM THE SLAVE NARRATIVES (Spencer Crew, Cynthia Goodman & Henry Louis Gates, Jr. eds., 2003), as are early accounts written by former slaves, *see, e.g.*, SLAVE NARRATIVES (William L. Andrews & Henry Louis Gates, Jr. eds., 2000) (collecting accounts).

Some scholars have criticized the current system of body part allocation for its mistreatment of people of color. *See, e.g.*, Ian Ayres, Laura G. Dooley & Robert S. Gaston, *Unequal Racial Access to Kidney Transplantation*, 46 VAND. L. REV. 805 (1993) (drawing on economic methods to show that the federal policy of allocating kidneys according to “antigen matching” creates an illegitimate burden on blacks waiting for kidneys); Michele Goodwin, *Deconstructing Legislative Consent Law: Organ Taking, Racial Profiling & Distributive Justice*, 6 VA. J.L. & TECH. 2 (2001) (critiquing “presumed consent” statutes for compelling racial minorities to contribute their posthumunous organs according to a notion of a “social contract” from which they are presently excluded).

152. One of the traditional arguments against a free market in organs is its impact on the poor. As Banks observes,

[a] living provider organ market system may result in a disproportionate number of poor people selling their nonviable organs, such as kidneys, to benefit a disproportionate number of rich organ purchasers. This could result in a greater number of poor people living in diminished physical states due solely to their economic misfortune.

Banks, *supra* note 113, at 80 (1995). Market advocates, however, find exploitation concerns hypocritical and point out that society tolerates the disproportionate participation of the poor in dangerous, unpleasant, but socially beneficial activities, such as paid drug trials, military service, and farm work. *See* Gill & Sade, *supra* note 113, at 34-36; *see also id.* at 29-33 (arguing that the exploitation claim is also misplaced because kidney donation is a safe procedure that is actively encouraged and praised and that using nonmarket methods of distributing kidneys would ensure that the rich are not disproportionately helped). While these discussions are by no means trivial, I believe that their treatment of the problem is incomplete. *See* CALABRESI & BOBBITT, *supra* note 109 (discussing the definition of, and reasons for, merit goods and wealth-distribution-neutral markets).

Law and Labor and Law and Poverty scholars would also undertake their own mapping of the legal terrain, highlighting ways in which the law has devalued the autonomy of workers or the poor. For example, they would cite the fellow-servant rule and other doctrines that insulated companies from tort liability caused by industrialization in the late nineteenth century. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967). Or they would employ law-and-economics methods to assess these rules and the pressures that led to no-fault workers compensation in the beginning of the twentieth century.

range of success as those in “gentler” occupations, after transplants,¹⁵³ would, if true, be highly relevant to the choice among systems that made more or fewer transplant organs available.

The specific questions, the legal and extralegal sources of values, the suitability of different decisionmakers, and perhaps even the conclusions might well be different, then, depending on whether one’s Law and Status approach was focused on feminism, race, poverty, sexual orientation or, even, nobility or caste preference. But the *type* of scholarship involved and the way the issues would be posed would be highly similar, and quite, quite different from the scholarship deemed appropriate by doctrinalists, “Law and . . .” scholars, and devotees of Legal Process.

CONCLUSION

Which of these approaches is law and legal scholarship? I believe that each of them has much to be said for it. Indeed, I have myself done studies which, I think, partake significantly of every one of them.¹⁵⁴ It is also not impossible to engage in complex mixtures of them, and the insights of each can be of considerable help in filling out the gaps in—the criticisms that can appropriately be made of—all of them. Nevertheless, they each do represent widely differing ways of viewing laws, legislatures, courts, legal scholarship, and the role these should play in society and in the making of society’s rules. In particular, the position each takes with respect to the legal scholar’s part in law reform, like the position each takes of the function of lawmaking/law-stating bodies like courts, is different in both subtle and dramatic ways. That each has played an important role in American law in this century, that manifestations of each can be found in the legal thought of much earlier centuries, and that each has waxed and waned and then, frequently in a new version, has waxed again, suggests that they are all likely to remain central to our law well into the future.

I wish I could specify when the conditions are such that each is most likely to flourish and (it is not the same thing) that each will probably be most valuable to a society and its legal system. I do believe that legal scholars, whatever their preference among these approaches and their variants may be, would be well advised to be open to those whose preferences are far different. For the history of our law suggests that the crucial insights of any given time can, quite unexpectedly, come from each and every one of them.

153. The alleged “bad results” of laborers on dialysis was an important basis for the system of allocation of dialysis units that for a time prevailed in England. See CALABRESI & BOBBITT, *supra* note 109, at 185.

154. See, e.g., CALABRESI, *supra* note 35 (law and economics), CALABRESI, *supra* note 101 (doctrinalism, law and status); CALABRESI & BOBBITT, *supra* note 109 (legal process, law and economics, law and philosophy); Calabresi, *supra* note 50 (legal process); Calabresi & Melamed, *supra* note 35 (law and economics).
